Filed 1/27/17 In re J.B. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.B., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	F072070 (Super. Ct. No. 516917) **OPINION**
D.M., Petitioner, v. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent; STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Real Party in Interest.	F073131

THE COURT[*]

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Roshni Mehta, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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Mother D.M. appeals from the juvenile court's order terminating her parental rights to her biological son, J.B. She argues reversal is required because the Stanislaus County Community Services Agency (Department) failed to comply with the notice requirements of the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.). Mother has also filed a document that purports to be a petition for an extraordinary writ. On our own motion we ordered this petition consolidated with this appeal.

In our initial opinion in this case, we concluded mother's appeal was untimely because the trial court found ICWA did not apply at the combined jurisdiction/disposition hearing, and she failed to appeal from that order. We also denied mother's petition for an extraordinary writ concluding it did not have any merit.

The Supreme Court accepted review of our initial opinion. It subsequently ordered this court to vacate our opinion, and reconsider the matter in light of *In re Isaiah W.* (2016) 1 Cal.5th 1 (*Isaiah W.*). We have done so.

As a result of the remand and the Supreme Court's decision in *Isaiah W.*, we conclude mother's appeal was timely, but also conclude it does not have any merit as the juvenile court complied with the requirements of ICWA. Since the issue decided in

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[*] Before Levy, Acting P.J., Franson, J. and Smith, J.

Isaiah W. is not relevant to the issues raised in mother's petition for an extraordinary writ, we again deny the writ concluding it does not have any merit.

FACTUAL AND PROCEDURAL SUMMARY

The issue in this case does not require a detailed recitation of the underlying facts. On December 9, 2013, Department filed a petition alleging J.B. came within the jurisdiction of the juvenile court pursuant to the provisions of Welfare and Institutions Code section 300, subdivisions (b) and (g).[1] The petition alleged that mother had left her then two-year-old child alone at home while she went out, she became intoxicated and belligerent at a pizzeria resulting in the police being called. Mother's home was found to be filthy and unfit for human occupation. The home did not have electricity or natural gas.

J.B. was detained. At the combined jurisdiction/disposition hearing, the allegations of the petition were determined to be true and the juvenile court found J.B. was a person described by section 300, and removed him from the custody of his parents. Reunification services were ordered for both parents.

Approximately two months later, Department filed a petition seeking to terminate family reunification services for both mother and father. The essence of the petition was that neither parent had participated in reunification services, and had not attended their scheduled visits with J.B. At the hearing on the petition, the juvenile court terminated reunification services for mother, but continued the services for father.

At the 12-month review hearing, Department recommended that reunification services for father be terminated due to his failure to participate in substance abuse treatment and mental health counseling. After a contested hearing, reunification services

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[1] A first amended petition with additional allegations, most directed at father, was filed on December 27, 2013.

References to code sections are to the Welfare and Institutions Code.

for father were terminated. Five months later, the juvenile court terminated mother's and father's parental rights after a contested hearing. The juvenile court adopted a permanent plan of adoption.

DISCUSSION

Mother's only argument is that the juvenile court failed to comply with the provisions of ICWA. Although Department sent notice to the tribes based on information provided by mother and her relatives, mother asserts the information provided to the tribes was incomplete.

Summary of ICWA

"The federal Indian Child Welfare Act . . . provides: 'In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.' (25 U.S.C. § 1912(a).) This notice requirement, which is also codified in California law (. . . § 224.2 . . .), enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding. No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives the required notice. (25 U.S.C. § 1912(a); see . . . § 224.2, subd. (d).)" (*Isaiah W.*, *supra*, 5 Cal.5th at p. 5.)

The issue raised by mother is not whether the appropriate Indian tribes were given notice of the proceedings, but whether the notice actually given was adequate.

> "ICWA allows an Indian tribe to intervene in dependency proceedings, to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . .' [Citation.] ICWA contains specific notice requirements that apply when the juvenile court knows or has reason to know that an Indian child is involved.

[Citation.] The Indian tribe determines whether the child is an Indian child, and its determination is conclusive. [Citation.] The juvenile court ' "needs only a suggestion of Indian ancestry to trigger the notice requirement." ' [Citation.] Under ICWA, no foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives notice. [Citations.]

"ICWA notice requirements are strictly construed and must contain enough information to be meaningful. [Citation.] In 2006, the Legislature enacted section 224.2 . . . , which 'largely tracks the ICWA . . . .' [Citation.] Section 224.2 provides that notice shall include '[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.' (§ 224.2, subd. (a)(5)(C).) Section 224.2 does *not* require that notice include information about great-great-grandparents.

"Like section 224.2, federal regulations do not require the disclosure of information concerning ancestors more remote than great-grandparents. Federal regulations require the notice to include '[a]ll names known . . . of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birth dates; places of birth and death; tribal enrollment numbers, and/or other identifying information.' [Citations.]" (*In re J.M.* (2012) 206 Cal.App.4th 375, 380.)

" 'The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation.] We review the trial court's findings for substantial evidence. [Citation.]' [Citation.] ' "While the record must reflect that the court considered the issue and decided whether ICWA applies, its finding may be either express or implied." [Citations.]' [Citation.]" (*In re Christian P.* (2012) 208 Cal.App.4th 437, 451.) "Deficiencies in ICWA inquiry and notice may be deemed harmless error when, even if proper notice had been given, the child would not have been found to be an Indian child. [Citations.]" (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

***Initial Opinion and* Isaiah W.**

Relying on *In re Pedro N.* (1995) 35 Cal.App.4th 183 (*Pedro N.*), we concluded in our initial opinion that mother's appeal was untimely. *Pedro N.* held that when a juvenile court makes a finding that ICWA does not apply in that case at or before the disposition hearing, a parent must challenge that finding in an appeal from the disposition order, or he or she loses the right to contest the applicability of ICWA. (*Pedro N.*, *supra*, 35 Cal.App.4th at p. 189.)

The holding in *Pedro N.* was disagreed with by various other courts of appeal. The Supreme Court accepted review in *Isaiah W.* to resolve the conflict among the courts of appeal. The Supreme Court disapproved of *Pedro N.* holding, in essence, that because the juvenile court has a continuing obligation through the proceedings to comply with ICWA, a parent may raise the issue of whether the juvenile court complied with ICWA at any stage of the proceedings. (*Isaiah W.*, *supra*, 1 Cal.5th at pp. 14-15.)

This case is distinguishable from *Isaiah W.* In *Isaiah W.*, as in *Pedro N.*, the juvenile court found no reason to know the child before it was an Indian child. Isaiah's mother indicated there may be some Indian ancestry, but prior to entering a disposition order the juvenile court concluded that any possibility that Isaiah was an Indian child was too remote for it to find ICWA applicable. (*Isaiah W.*, *supra*, 1 Cal.5th at p. 6.) As stated above, the issue was whether mother's appeal was timely because she appealed from the order terminating her parental rights, but failed to appeal from the disposition order. The Supreme Court reversed concluding the appeal was timely because ICWA imposed a continuing duty on the juvenile court to comply with its requirements. (*Isaiah W.*, *supra*, at p. 6.) Therefore, because the juvenile court found ICWA inapplicable mother could assert the juvenile court erred at any stage of the proceedings.

In summarizing the holding, the Supreme Court stated that if a juvenile court has reason to know a child is an Indian child, it must notify any relevant tribes. "If adequate and proper notice has been given, and if neither the [Bureau of Indian Affairs] nor any

tribe provides a determinative response within 60 days, then the court may determine that ICWA does not apply to the proceedings. (§ 224.3[, subd.](e)(3).) At that point, the court is relieved of its duties of inquiry and notice (§ 224.2, subd. (b)), unless the [Bureau of Indian Affairs] or a tribe subsequently confirms that the child is an Indian Child (§ 224.3[, subd.](e)(3))." (*Isaiah W.*, *supra*, 1 Cal.5th at pp. 14-15.)

In the case before us, the juvenile court was put on notice that the child may be an Indian child. Accordingly, the juvenile court ordered Department to comply with ICWA. Department sent out notices to the appropriate parties, and did not receive a response indicating the child was an Indian child. Based on this information, the juvenile court determined at the disposition hearing that ICWA did not apply. There is no evidence in the record that at any time after the disposition hearing any tribe asserted the child was an Indian child. Therefore, pursuant to *Isaiah W.*, the juvenile court was relieved of its duties of inquiry and notice after its finding at the disposition hearing. (§ 224.2, subd. (b).) Since the holding of *Isaiah W.* was based on the juvenile court's continuing duty of inquiry and notice, and no such duty existed in this case, one could argue that if mother wanted to challenge the finding that ICWA did not apply she was required to appeal from the disposition order, and her failure to do so now precludes her from raising the issue in an appeal from the order terminating her parental rights. This precise issue was not before the Supreme Court, and therefore was not addressed, in *Isaiah W.*

The more prudent course of action, however, is simply to address the merits of mother's appeal. In order to bring finality to this appeal, and provide the child with the stability that is important to every child, we will follow the more prudent course.

Sufficiency of the Notice

Mother acknowledges Department sent notices to the tribes identified by her, but claims these notices were deficient in three respects. First, mother argues the notices failed to inform the tribes that Ella C., who was identified in the notices, was actually the child's maternal great-great-grandmother. Second, mother asserts the notices failed to

include birth information for mother or the maternal grandmother. Third, mother points out that the second notice sent to the tribes did not include the child's birth certificate, but instead included the birth certificate for a different child.

The relevant documents are found in two groups. The petition was filed on December 9, 2013. On December 10, 2013, mother and father filed form ICWA-020, Parental Notification of Indian Status, stating they did not have any known Indian ancestry. The following day mother filed another form ICWA-020 stating she may have Indian ancestry. She did not identify the name of any tribe or band of Indians, or provide any other information on the form to support her claim.

On December 23, 2013, apparently after consulting with mother and her family, Department served and filed a form ICWA-030, Notice of Child Custody Proceeding for Indian Child, advising of the jurisdiction/disposition hearing scheduled for January 22, 2014. The form was served on both parents, all counsel, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians, the Sacramento Area Director for the Bureau of Indian Affairs, and the Secretary of the Interior. The notice provided relevant information on mother, father, maternal grandmother, maternal and paternal grandfather, and one maternal great-grandmother. The form indicated no information was available for the paternal grandmother and the remaining maternal great-grandparents. The form provided the address, and date of birth for the maternal great-grandmother, maternal grandmother, and mother.[2] Each also indicated she was affiliated with the Cherokee tribe of Indians. Omitted was the place of birth of any of these individuals. Also included with the notice was the child's birth certificate, as well as receipts for the documents served through the mail. Finally, the form included the names of other related individuals, including Ella C.

[2] We focus on the maternal ancestors since this is the line on which the claim the child was an Indian child was based. Additional, irrelevant information was also included in the form.

The form indicated that Ella C. was born in 1903, and may have received treatment at an Indian health clinic, and may have lived on a rancheria or reservation. The form did not indicate that Ella C. was apparently a maternal great-great-grandmother. Finally, Department's social worker affirmed that the form contained all information provided to it about the relatives of the child.

Department filed ICWA mail receipts on January 8, 2014, which established the mailed documents were received by the intended recipients. The jurisdiction/disposition report indicated that mother indicated she may have Cherokee Indian ancestry, and appropriate notices were sent. The report concluded, apparently based on a lack of response from any tribe, that ICWA did not apply.

Another ICWA-030, Notice of Child Custody Proceeding for Indian Child, was filed and served on January 27, 2014. This notice advised of the contested jurisdiction/disposition hearing to be held on February 28, 2014. The form was identical in all relevant respects. It was served on the Eastern Band of Cherokee Indians, the Cherokee Nation of Oklahoma, the Sacramento Area Director for the Bureau of Indian Affairs, and the Secretary of the Interior. The United Keetoowah Band of Cherokee Indians was not served with the form. Erroneously served with the form was a birth certificate for a different child.

On February 4, 2014, Department filed mail receipts which established the mailed documents were received by the intended recipients.

On February 19, 2014, Department filed a document entitled "Motion for Determination of ICWA Applicability" (some capitalization omitted) and which included responses from the United States Department of the Interior, the Cherokee Nation, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians

in Oklahoma.[3] Each response indicated that based on the information provided the child was not an Indian child.

On February 19, 2014, the juvenile court signed the order included with the motion finding that ICWA did not apply.

We turn now to the three errors identified by mother. The first is the failure to identify Ella C. as the child's great-great-grandmother. Ella C. was listed as a relative, but the exact relationship was not indicated. However, great-great-grandparents are not required to be included in ICWA notices. (*In re D.N.*, *supra*, 218 Cal.App.4th at p. 1252; *In re J.M.*, *supra*, 206 Cal.App.4th at p. 381.) Therefore, inclusion of Ella C. in the notice provided information beyond that which was required.

Moreover, we see no prejudice that could result from the omission even if it were required. The tribes were provided with the pertinent information for the mother, maternal grandmother, and maternal great-grandmother. When the tribes researched their membership rolls, if Ella C.'s name was in the rolls she would have been discovered as part of the direct ancestral line for these three women. That her name was not discovered strongly suggests she was not included in the tribes's membership rolls.

Mother's second argument is that the notices were deficient because it failed to include the place of birth for mother or the maternal grandmother. We observe that both notices indicate the social worker who completed the forms provided all available information with which she was provided. Mother fails to cite to any part of the record which establishes this information was provided to the social worker, instead relying on speculation and the assertion the social worker had some interaction with both mother and maternal grandmother.

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[3] The response from the United Keetoowah Band of Cherokee Indians in Oklahoma was dated December 30, 2013, which suggests it was received before the January 27, 2014, ICWA-030 was sent. This would explain why this band of Indians was not served with the January 27, 2014, ICWA-030.

While the social worker was required to provide all available information with which she was provided, from this record we cannot conclude the social worker was actually provided with the place of birth of mother and maternal grandmother. Both may have refused or were unable to provide such information when they spoke to the social worker. In the absence of an affirmative record showing such information was provided to the social worker, no error occurred. Moreover, mother fails to explain how the absence of this information affected the ability of the tribes to search their membership rolls.

Finally, mother points out the second notice included a birth certificate for a child unrelated to this action. While this was error, the correct birth certificate was provided in the initial notice to each tribe. The error was therefore harmless.

We also note there is virtually no evidence that J.B. was an Indian child. ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) In this case, there is no evidence in the record that (1) J.B. is a member of an Indian tribe, (2) J.B. was eligible for membership in an Indian tribe, or (3) mother was a member of an Indian tribe. Instead, mother claimed that her grandmother may have been a member of an Indian tribe. Even if mother's claim is correct, J.B. would not be an Indian child and ICWA would not apply. (25 U.S.C. § 1911(c) [Indian tribe may intervene in proceedings involving an Indian child].)

Petition for Extraordinary Writ

We now turn to mother's petition for an extraordinary writ. In the petition, mother admits she had difficulty, but asserts she has made positive changes in her life. She has included numerous documents, which indicate she had participated in some programs, and has apparently obtained housing with the assistance of Stanislaus County Shelter Plus Care Program. Also included is a letter dated over two years ago from Josie's Place

Service Team of Stanislaus County Behavioral Health and Recovery Services. Mother asks us in this petition to vacate the order after the section 366.26 hearing, order reunification services, order visitation, and grant her custody of J.B.

We deny the petition for a variety of reasons. Primarily, the relief sought by mother is untimely. At the hearing on February 17, 2015, the trial court terminated reunification services for father and set the matter for a hearing pursuant to section 366.26. The date scheduled for the section 366.26 hearing was June 16, 2015. On March 5, 2015, a Notice of Hearing on Selection of a Permanent Plan was served on mother advising her that at the hearing the juvenile court might terminate her parental rights and free J.B. for adoption.[4] Mother was represented by counsel throughout this time, and testified at the June 16, 2015, hearing.

Mother's petition for extraordinary writ, and specifically her request to vacate the order made after the section 366.26 hearing is untimely. Mother failed to file a notice of intent to file a writ petition, and failed to file the writ petition within the framework provided by California Rules of Court, rule 8.450(e)(4) and section 366.26, subdivision (*l*).

Similarly, many of the issues mother now asks us to consider should have been brought up in the trial court or in an appeal from the orders terminating the services she now wishes to have, or by writ from the order setting the section 366.26 hearing. Mother's failure to pursue any remedy until this time renders her request untimely.

Finally, our review of the documents filed by mother establishes that they do not support mother's assertion that she has dramatically changed her life. For example, the Sierra Vista Child & Family Services Child Abuse and Neglect Discharge Report Form, which we understand to be a discharge report from a program in which mother

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[4] The hearing was not completed on this date and was continued to July 16, 2015, at which time the juvenile court issued its order.

participated, shows mother's progress was unsatisfactory, and that in most categories she either needed improvement or could not be rated at all. For each of these reasons, we find there is no merit to mother's petition.

DISPOSITION

The order appealed from is affirmed, and the petition for an extraordinary writ is denied.